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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

TANDY CORPORATION,
Intervenor/Appellant,
v.
UNITED STATES OF AMERICA,
and
WESTERN ELECTRIC COMPANY, INC., AND
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Appellees.

On Appeal From The United States District Court For The District Of Columbia

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

MALCOLM R. PFUNDER, *Counsel of Record*
JOHN T. MASTERSON, JR.
HAMEL, PARK, MCCABE & SAUNDERS
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

GEORGE A. KUHNREICH
Tandy Corporation
One Tandy Center
Fort Worth, Texas 76102
Counsel for Intervenor/Appellant

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Pursuant to Rule 16.5 of the Supreme Court Rules, Intervenor/appellant Tandy Corporation[1/] submits this brief in opposition to the Motions to Affirm filed by the Department of Justice and by American Telephone and Telegraph Co., et al. Nothing in these motions diminishes the necessity for plenary review of the issues raised in Tandy's Jurisdictional Statement. United States v. E. I. duPont de Nemours and Co., 366 U.S. 316, 323 (1961). Nor is the nature

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1/ Hereinafter referred to as "Tandy." A listing of all parent companies, subsidiaries and affiliates of Tandy, as required by Rule 28.1, appears on the first page of the Application of Tandy Corporation for an Extension of Time in which to Docket Appeal, filed with this Court on November 17, 1982 (No. A-449).

of the required review any different because a consent decree is involved.2/

Phone Center Stores

The District Court erred in holding that the consent decree proposed by the Justice Department and defendant AT&T satisfied the public interest standard of the Tunney Act. Specifically, the decree fails to provide a meaningful remedy for AT&T's long-standing dominance of the customer premises equipment (CPE) industry -- dominance which is explicitly recognized

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2/ The Justice Department points out that several cases cited by Tandy's Jurisdictional Statement "involved litigated judgments where the judge's exercise of discretion in fashioning the various elements of relief was at issue." (Motion to Affirm at 27 n.33). These were precisely the kinds of cases which the District Court believed "form the most relevant yardstick for determining whether the proposed consent decree will further antitrust policies . . . ." (J.S. App. at 29-30). Neither the Department nor AT&T has previously objected to the Court's reliance on these cases.

by both the Department of Justice (Motion to Affirm at 13) and the District Court (J.S. App. at 98). AT&T's divestiture of the BOC's, while necessary to the creation of a competitive CPE market, is not by itself sufficient to achieve this essential goal.

The District Court held that more was required. The Court determined that it was not in the public interest to keep the BOC's out of the business of marketing CPE, because of "the very substantial contribution these companies could make to vigorous competition in the customer premises equipment market." (J.S. App. at 108). It found that the divested BOC's "are more likely than any other competitive entity to provide an effective counterbalance to AT&T's market strength and thereby to promote a genuinely competitive

market." (J.S. App. at 109). The Court thus equated creation of a genuinely competitive CPE market with the public interest standard of the Tunney Act. But it then approved a decree which did not provide that remedy and thus did not, even when viewed as a whole, satisfy the standard it had adopted.3/

The decree as presently framed allows AT&T to retain its dominant position in CPE marketing by retaining its nationwide

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3/ Both AT&T and the Department of Justice emphasize that the decree approved by the District Court was the product of compromise and urge this Court to evaluate criticisms of the decree in that light. (AT&T Motion to Affirm at 25-26; DOJ Motion to Affirm at 25-26). Indeed, that is precisely what the Tunney Act mandates; the reason for its enactment was to require that any such compromise be subjected to judicial scrutiny and satisfy a public interest standard. Here, however, the bargain struck by the parties unacceptably compromised the public interest and therefore should not have been approved by the District Court without appropriate modification.

distribution system of "Phone Center" retail outlets, which have to date been owned and operated by the BOC's.4/ Effective January 1, 1983, AT&T will take over from the BOC's the sale of all new CPE. Prior to early 1984 the BOC's cannot even begin meaningful preparations for entry into CPE retailing, since under the decree all assets related to that business must be delivered to AT&T at the time of divestiture. AT&T, with the District Court's blessing, plans simply to transfer the entire Phone Center retailing operations

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4/ The Department of Justice argues that divestiture of the BOC's will remove AT&T's ability to engage in anticompetitive conduct in the equipment market. (Motion to Affirm at 27). But even the District Court held that divestiture of the BOC's alone was insufficient to satisfy the public interest standard of the Tunney Act and therefore removed the prohibition on the BOC marketing of CPE. (J.S. App. at 109). However, what is needed to make competition effective in this market is divestiture of AT&T's Phone Center Stores to the BOC's.

from the BOC's to its new subsidiary, American Bell, thereby retaining its market position intact.

The decree thus cripples the BOC's in two ways. Not only does it force them to abandon a business in which they have been significant factors and to wait at the starting line for at least a year after the gun has gone off, but it delivers to AT&T a fully operational, nationwide retailing system, along with accumulated customer goodwill, store locations, and experienced marketing personnel. It is conceivable, as the District Court indicates (J.S. App. at 108 n.248), that some or all of the divested BOC's will nevertheless decide sometime in 1984 or later to begin the process of opening retail locations to sell CPE directly to consumers. It is also conceivable that, in a matter of years, these

efforts may be sufficiently successful to provide some meaningful competition to "counterbalance . . . AT&T's market strength." But the inevitable delay and the unnecessary handicap placed upon the BOC's by the decree approved by the District Court makes realization of this remedy distant and uncertain at best.5/

The very cases cited with approval by the District Court require stronger relief. (See J.S. App. at 30 & nn.79, 80.) Tandy agrees with the District Court's statement that

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5/ Contrary to the assertion of the Justice Department (Motion to Affirm at 27), there is therefore a strong "competitive basis" for forcing AT&T to divest its Phone Center Stores.

> A decree must "break up or render impotent the monopoly power found to be in violation of the Act," that is, it must leave the defendant without the ability to resume the actions which constituted the antitrust violation in the first place. For these reasons, the decree should not be limited to past violations; it must also effectively foreclose the possibility that antitrust violations will occur or recur.

(J.S. App. at 30, footnote omitted). Because the decree approved by the District Court does not provide for BOC retention of their Phone Center Stores, it cannot satisfy that standard.

> Divestiture or dissolution must take account of the present and future conditions in the particular industry as well as past violations. It serves several functions: (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the [Sherman] Act.

Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128-29 (1948). Only AT&T's divestiture of the Phone Center Stores can adequately assure the prompt realization of the kind of competition in CPE marketing required by the public interest, as the District Court has itself defined it.6/

Patent Licensing

The District Court also erred in approving the termination of the compulsory patent licensing provisions which had been imposed by the 1956 Western Electric

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6/ AT&T's argument that "appellate courts are 'powerless to rewrite the provisions of a settlement agreement' lest they change a provision that was essential to one party's assent" (Motion to Affirm at 26) misses the point. Tandy contends that the decree approved by the District Court fails to satisfy the Tunney Act's public interest standard. If that contention is sustained on appeal, the parties themselves would have to determine whether to rewrite their consent decree in such a way that the statutory standard would be met.

consent decree. The record before the District Court offered no basis for its summary determination that a consent decree eliminating those requirements satisfied the Tunney Act's public interest standard.7/

Neither AT&T nor the Department of Justice adequately respond to this point in their respective motions to affirm.8/ Instead, each raises issues that are only peripheral and diversionary.

The compulsory licensing requirements in the 1956 decree were directly responsive to allegations of patent abuse

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7/ Whether this action is regarded as a modification of an existing decree or as part of a new settlement, the parties have the burden of demonstrating, and the District Court must find, that the proposal is in the public interest. J.S. App. at 25 n.67; Tandy Jurisdictional Statement at 13.

8/ AT&T relies primarily on argument by adjective, rather than on substance, labeling Tandy's position "false," "spurious," "inconsistent," "frivolous" (three times), and "insubstantial."

contained in the Justice Department's 1949 antitrust complaint.9/ Attorney General Brownell, in announcing the Western Electric settlement on January 24, 1956, stated:

> The patent relief obtained in this decree is a long stride forward in the efforts of the Department of Justice to destroy the unlawful divisions of patent rights heretofore existing for many years in electronics.10/

The trial of the 1974 case did not deal with patent issues. The parties did not propose to the Court the elimination of the 1956 decree provisions during discovery or

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9/ AT&T attempts to characterize these provisions as being imposed "in exchange for preserving the integrated Bell System." (Motion to Affirm at 29, emphasis in original). AT&T seems to confuse an explanation of why compulsory licensing requirements may have been acceptable to AT&T with the reasons why they were imposed.

10/ Reprinted in Consent Decree Program of the Department of Justice, Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong. 2nd Sess. (1958) at p. 1865.

trial of the case. In fact, it appears that the Government suit was tried on the assumption that the 1956 decree would remain in place. Thus the parties had no occasion to develop, and the District Court had no occasion to hear and consider, evidence relating to possible elimination of the licensing provisions.11/ The Court simply had no record before it relating to patent use or abuse, the competitive impact of the licensing provisions, the likelihood of future antitrust violations relating to patents, or any of the information which would have permitted it to consider whether elimination of those requirements was in the public interest. Thus the Court's

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11/ The Justice Department's speculation concerning the likelihood of continued licensing by AT&T (Motion to Affirm at 28) is wholly unsupported and is undermined by AT&T's fierce opposition to retention of any obligation to license its patents.

"extensive knowledge of the telecommunications and related industries" (DOJ Motion to Affirm at 28 n.34) is unrelated to the patent licensing issue.

AT&T attempts to raise a diversionary issue by suggesting that Tandy failed to comply with the District Court's request that any person proposing an evidentiary hearing outline in detail its content, duration, and the like. (Motion to Affirm at 28). In its brief filed with the District Court, Tandy pointed out the inadequacy of the parties' justification of their proposed consent decree. Brief of Tandy Corporation Regarding Absence of Restrictions on AT&T (filed June 14, 1982) at 14-19. The parties' failure to satisfy their burden of demonstrating that elimination of compulsory patent licensing was in the public interest should have precluded the

District Court from approving the proposed decree. A variety of techniques, including a request for evidentiary hearings, might have been employed by the parties to cure this defect. The District Court could not supply an adequate record without the assistance of the parties, and its memorandum order of May 25, 1982, surely did not contemplate that Tandy as a commentor would be in a position to do so.

The issues listed in Tandy's Jurisdictional Statement (at 14) were merely suggestive of the kinds of considerations that might bear upon an adequately supported public interest determination. The problem is complex, and the issues, difficult, as AT&T in effect admits (Motion to Affirm at 29). But the parties and the District Court cannot for that reason ignore them and instead rely solely on conclusory

predictions about the likely future course of research and development in the telecommunications industry. (DOJ Motion to Affirm at 27-28).12/

Even if AT&T were correct in stating that the premise underlying the 1956 decree provisions "was that patents funded in whole or in part by revenues from franchised monopolies should be made available to all" (Motion to Affirm at 29),13/ divestiture of the BOC's does not cause that premise to "vanish." The nearly 10,000

12/ While it may be true that evidentiary hearings are optional under the Tunney Act (DOJ Motion to Affirm at 28), that is not the issue. The issue is whether the District Court had an adequate evidentiary basis for its determination that mandatory patent licensing could be eliminated. Tandy contends that it did not.

13/ If this premise is correct, the District Court's treatment of the patent licensing issue (J.S. App. at 78-79) seems deficient in failing to retain mandatory licensing requirements at least for existing and pending patents for some period of time.

patents presently held by AT&T have all been funded from revenues generated by its franchised monopolies. Moreover, even after divestiture AT&T will continue to fund its research and development activities through its intercity service and telecommunications equipment manufacturing and marketing activities. AT&T's dominance of these markets (J.S. App. at 98) provides it with monopoly revenues, which will continue well into the future. The premise for mandatory patent licensing will thus last until AT&T's dominant market position has been dissipated by effective competition.

Thus, it is not correct to say that retention of mandatory patent licensing requirements would place AT&T at a competitive disadvantage. (AT&T Motion to Affirm at 29; DOJ Motion to Affirm at

28). So long as AT&T continues to reap the benefits of its dominant position in the intercity and CPE markets and its prior ownership of local exchange monopolies, it is not unreasonable to require that patents funded with revenues from these operations be made available to the public upon payment of reasonable royalties. Elimination of mandatory patent licensing prior to the emergence of "genuinely competitive" markets (J.S. App. at 109) would instead place AT&T's competitors at an unfair disadvantage and tend to perpetuate AT&T's market dominance.

CONCLUSION

For the above reasons, Tandy respectfully requests this Court either to accept its appeal and to conduct a plenary review, with briefs and oral argument, of the issues

raised therein, or to remand this appeal to the Court of Appeals for such review.

Respectfully submitted,

MALCOLM R. PFUNDER,

Counsel of Record

JOHN T. MASTERSON, JR.

HAMEL, PARK, McCABE & SAUNDERS
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

GEORGE A. KUHNREICH

Tandy Corporation
One Tandy Center
Fort Worth, Texas 76102

Attorneys for Intervenor/ Appellant Tandy Corporation

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